

# DOCKET SECTION

PRESIDING OFFICER'S  
RULING NO. R97-1/86

UNITED STATES OF AMERICA  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268

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Postal Rate and Fee Changes

Docket No. R97-1

## PRESIDING OFFICER'S RULING GRANTING IN PART MOTION OF ALLIANCE OF NONPROFIT MAILERS TO COMPEL RESPONSES TO INTERROGATORIES ANM/USPS-20-23 AND 25-26 AND FOR PERMISSION FOR LATE FILING OF SUPPLEMENTAL TESTIMONY

(January 9, 1998)

On December 22, the Alliance of Nonprofit Mailers (ANM) submitted a motion to compel responses to six interrogatories, ANM/USPS-20-23 and 25-26, served by ANM on December 9.<sup>1</sup> The Motion further requested leave to submit additional supplemental testimony within two weeks of receipt of the Postal Service's answers to the interrogatories. Motion at 1.

Interrogatory ANM/USPS-20 requests information on the volume of Nonprofit Standard Mail (A) (formerly nonprofit third-class bulk mail) that was entered at Standard Mail (A) (formerly third-class) rates due to Postal Service determinations that the mail did not qualify for nonprofit rates for three separate time periods.<sup>2</sup> Covering the same

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<sup>1</sup> Motion of The Alliance of Nonprofit Mailers to Compel Answers to Interrogatories and for Permission to File Supplemental Testimony within Two Weeks of Receipt of Answers from the USPS (ANM/USPS-20-23 and 25-26) (December 22, 1997) (Motion).

<sup>2</sup> The three time periods are: (1) from May 5, 1995 (the issuance date of regulations implementing eligibility restrictions enacted by the Revenue Foregone Reform Act and the General Governmental Appropriations Act of 1991) through the end of Fiscal Year (FY) 95; (2) FY 1996; and (3) the beginning of FY 1997 through March 8, 1997, the ending date of the Nonprofit Mail Characteristics Study submitted in R97-1 as LR-H-195. ANM/USPS-20; Motion at 1-2.

three time periods, ANM/USPS-21 asks the Service to indicate how many pieces and pounds of mail originally entered as Nonprofit Standard Mail (A) or nonprofit third-class bulk mail later generated additional postage payments after the Service subsequently determined that the mail was ineligible for nonprofit rates, and required the mailer to pay bulk third-class or Standard Mail (A) rates.

ANM/USPS-22 requests the Postal Service to provide all Service publications and regulations in effect between May 5, 1995 and March 8, 1997 concerning the accounting treatment (in RPW data and elsewhere) of mail bearing Standard A (or third-class) nonprofit indicia which: (1) was entered at Standard Mail (A) commercial rates; or (2) later was assessed additional postage on the basis that the mail was ineligible for nonprofit rates. ANM/USPS-23 asks the Postal Service to provide the instructions given to IOCS tally takers regarding the classification of mail marked as Standard A nonprofit, but actually entered at another rate.

ANM/USPS-25 asks about Form 3602 mailing statement revisions (and the associated governing rules and Service compliance) made when Standard A mail was entered at nonprofit rates but later assessed additional postage under another rate class or subclass. ANM/USPS-26 seeks similar information about mailings that were not accepted by the Postal Service for mailing at nonprofit rates. The Postal Service filed an objection to all of the cited interrogatories on December 19, arguing that ANM's questions on the Service's data systems and their outputs are untimely and unduly burdensome. Objection of United States Postal Service to Interrogatories of the Alliance of Nonprofit Mailers (ANM/USPS-20-23, and 25-26) (December 19, 1997) (Objection) at 2-3.

In its Motion to Compel, ANM emphasizes the "anomalous and unprecedented deviation" between the costs attributable to Standard A nonprofit mail and Standard A commercial mail. Motion at 3. It is ANM's contention that the overall costs attributed to Standard A nonprofit mail are inflated because many pieces of Standard A mail ultimately charged Standard A commercial rates were nonetheless tallied in the IOCS,

erroneously, as Standard A nonprofit mail due to their initial nonprofit markings. *Id.* According to ANM, it is likely that the mail was properly recorded in the RPW system, and the "resulting mismatch between the IOCS data and the RPW data almost certainly has overstated the unit attributable cost of Nonprofit Standard Mail (A)." *Id.*

ANM suggests that a number of factors may be responsible for the unusually large amount of Standard A nonprofit mail entered at Standard A commercial rates, including changes in eligibility requirements and newly enacted reclassification requirements. Motion at 3-4. These factors also may have contributed to incorrect IOCS tallies and influenced the Nonprofit Mail Characteristics Study. *Id.* at 4. ANM contends that the occurrence of any such "anomalies" significantly casts a shadow over the integrity and reliability of the data systems for volumes and costs used by the Postal Service in preparation of its request. *Id.* at 5.

With regard to the issue of timeliness, ANM cites Rule 2.E. of the Commission's Special Rules of Practice as justification for the discovery requests at issue.<sup>3</sup> Rule 2.E. states, in relevant part:

...Generally, through actions by the presiding officer, discovery against a participant is scheduled to end prior to the receipt into evidence of that participant's direct case. An exception to this procedure shall operate when the participant needs to obtain information (such as operating procedures or data) available only from the Postal Service. Discovery requests of this nature are permissible up to 20 days prior to the filing date for final rebuttal testimony.

Special Rules of Practice 2.E. As the interrogatories solicit information relating to operating procedure and data available only to the Postal Service, ANM believes they "fall squarely within the exception" to the general discovery rule, as stated above. *Id.* at 6.

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<sup>3</sup> ANM takes issue with the Service's position that supplemental discovery on the Service's case was closed as of November 14, 1997. Motion at 6. Rather, ANM cites February 17, 1998 as the Commission's cutoff date for completion of discovery against the Postal Service. *Id.*

As for the Service's objection based on the "burdensome" nature of the discovery, ANM notes that it suggested a technical conference with the Postal Service to "explore possible alternatives" to the interrogatories, but was told that the Service could not identify a single person or even a small group of people who would be able to respond to the interrogatories.<sup>4</sup> Motion at 6-7. Finally, ANM argues that authority to provide supplemental testimony is necessary, given the current filing deadlines. It states that denial of this opportunity would compromise nonprofit mailers' ability to perform their services by forcing them to pay unjustifiably higher rates for an indefinite period of time. *Id.* at 7-8.

In opposition to ANM's Motion, the Postal Service reasserts its arguments of untimeliness and undue burden. See *Opposition of the United States Postal Service to Motion of the Alliance of Nonprofit Mailers to Compel Answers to Interrogatories and for Permission to File Supplemental Testimony within Two Weeks of Receipt of Answers from USPS (December 29, 1997) (Opposition)* at 1-4. Characterizing the interrogatories' focus as on data systems and their outputs, the Service maintains that the cost data were available for examination from the onset of the case, and that the deadline for such discovery was September 17.<sup>5</sup> The Postal Service also takes exception to ANM's argument that its interrogatories raise issues about the integrity of the reported costs and volumes. *Id.* at 2.

Further, ANM's proposed application of Special Rule 2.E is challenged by the Postal Service. Specifically, past Commission rulings are cited for the proposition that Special Rule 2.E. applies to data uniquely accessible to the Postal Service which is not part of the Service's case, and is further limited to when a participant needs data available from the Postal Service in order to prepare testimony to rebut participants other than the Postal Service. *Id.* at 2-3, citing P.O. Ruling R87-1/138 at 4; P.O. Ruling

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<sup>4</sup> The Service subsequently filed its Objection.

<sup>5</sup> In its Objection, the Service argues that even if ANM's queries may be deemed to concern sample design, the deadline for this supplemental discovery also has passed. Objection at 2.

MC96-3/36 at 2. The Service also contends that as ANM's disputed interrogatories actually seek new information requiring extensive research and analysis of data available only from "the Field," rather than existing data or operating procedures, application of Special Rule 2.E. is precluded. Opposition at 3.

Moreover, because developing requested information would mandate an exhaustive search of its field operations, the Postal Service claims that the interrogatories are unduly burdensome. *Id.* The Service suggests that even a comprehensive response, requiring it to "survey every point at which business mail may be entered" in order to review the relevant individual mailing statements, could prove futile as, for example, the Service possesses no indication of the extent to which any of the Form 3602 statement changes are standardized throughout the postal system. Objection at 2-3. This circumstance effectively rendered the proposed technical meeting useless, thus prompting the Service's rejection of ANM's conference suggestion. Opposition at 3.

Finally, the Postal Service opposes ANM's request for late filing of supplemental testimony, maintaining that this extension would compromise both the Service and intervenors' ability to conduct any meaningful discovery on the testimony, and is unjustified where it arises from ANM's own lack of diligence in identifying and pursuing those matters now at issue. Opposition at 4-5.

## DISCUSSION

Special Rule 2.E. is invoked by ANM as the basis for continued discovery against the Postal Service. The Service has cited presiding officer rulings from previous cases as support for an interpretation of the Rule which limits its application to data or information in the exclusive control of the Service that are needed to rebut *other* intervenors' cases, and *not* part of the Service's case-in-chief. While the Service accurately interprets P.O. Ruling MC96-3/36 for this proposition, application of Special

Rule 2.E. in that limited classification case may be distinguished from the current situation in the R97-1 omnibus rate case.

In MC96-3, the deadline for the filing of participants' cases-in-chief, including rebuttal to the Postal Service, had long passed when one intervenor submitted several interrogatories which, upon the Service's objections, were promptly followed by a motion to compel under Special Rule 2.E. Upon review of the interrogatories, the Presiding Officer determined that they had no possible bearing on that intervenor's preparation of evidence to be used as rebuttal against other intervenors' cases. See P.O. Ruling MC96-3/36 at 3. As such, the interrogatories were deemed as outside the ambit of discovery permissible under Special Rule 2.E. See also Docket No. MC97-5, Tr. 7/1652-53.

In contrast, ANM's outstanding interrogatories were served on the Postal Service 21 days prior to the December 30 deadline for filing of the cases-in-chief of R97-1 participants, including rebuttal to the Service. The interrogatories question cost allocation to Standard A nonprofit mail, which has broad implications about allocations to other subclasses of mail in this omnibus rate case. There can be little doubt that rebuttal testimony on this issue could be relevant.<sup>6</sup> While Special Rule 2.E. is designed to enable acquisition of information for the purpose of rebuttal, there is no requirement that the provision of this supplemental information be delayed until ANM, as an intervenor, is able to assess its necessity upon direct review of other intervenors' cases. As the Presiding Officer noted in R87-1, when faced with a similar situation with a motion to compel interrogatory responses, "it does not make sense to deny ANM [the intervenor] the use of Rule 2E simply because it anticipated this need before seeing the intervenor direct cases. If such anticipation is reasonable, allowing it to be acted upon promptly may help avert a last minute crush of interrogatories and production requests to the Postal Service." P.O. Ruling R87-1/138 at 3-4. Moreover, as was acknowledged

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<sup>6</sup> ANM's witness Dr. John Haldi does address the allocation of attributable costs in nonprofit Standard Mail (A) in his testimony submitted on December 30.

as the case in that ruling, the ANM interrogatories now at issue fall within the realm of litigation preparation for ANM and its ability to withstand examination and/or rebuttal.

See *id.* at 3.

However, the mere fact that ANM's interrogatories are arguably supported, rather than precluded, by Special Rule 2.E. does not obviate the need to balance other timeliness and undue burden concerns. It is the Commission's goal and mandate that these proceedings be conducted in a manner which preserves all parties' due process rights and is consistent with acceptable administrative procedures, while adhering to the statutorily imposed ten-month time limit for the conduct of this case. The essence of due process is "a reasonable opportunity to ask relevant questions and get responsive answers." P.O. Ruling R/97-1/69 at 3. All parties are therefore obligated to make a reasonable effort to focus discovery requests, submit them in a timely fashion and accordingly respond to complying submissions, particularly in light of the compressed schedule. With this in mind, I must deny ANM's Motion to Compel responses to ANM/USPS-20, 21, 25 and 26.

ANM/USPS-20 and 21 seek quantitative information on mail prepared for entry at Standard A nonprofit rates, but either entered at Standard A commercial rates (due to a Service determination before or during mail entry) or entered at Standard A nonprofit rates but later assessed back postage after the Service found the mail ineligible for nonprofit rates. This information, if available, focuses on the Postal Service's data systems and their outputs, which, the Service correctly notes, was the subject of extensive testimony presented in its direct case. While the timeframe of the Nonprofit Mail Characteristics Study (LR-H-195) is cited by ANM as a focal period in ANM/USPS-20 and 21, I don't believe the interrogatories are an attempt to gain a deeper understanding of the study, which was recently subject to cross-examination. Rather, they appear designed to further buttress a point raised in ANM's direct testimony, and as such seem to represent an afterthought. Thus, notwithstanding Special Rule 2.E., ANM's interrogatories should have been submitted during discovery on the Service's

direct evidence. Requiring the Postal Service to respond to the interrogatories at this stage of the proceeding is not appropriate, in light of the extensive field efforts required to gather the requested data and the probability that such efforts would be useless since the Service's current systems may not permit an accurate and comprehensive collection of the retrospective information. In this circumstance, the burden of responding to these questions outweighs the potential that answers might lead to the development of material testimony.

ANM/USPS-25 and 26 likewise request information which, on its face, appears to require Postal Service review of all applicable Form 3602 mailing statements in order to ascertain the number of mailings for which the Service revised the forms or the data reported on the forms. It is unclear whether, in response to the requisite changes, the Service revises the original Form 3602 mailing statement, or substitutes a new Form 3602. In either event, and even if all these forms were available, the review process (combined with extensive field collection) would be very difficult and time consuming for the Service. The information such examination would yield is outweighed by the substantial burden the process would impose upon the Service, a burden which is exacerbated by the lateness of the request, at this advanced stage of proceeding. As with ANM/USPS-20 and 21, ANM/USPS-25 and 26 should have been submitted during discovery of the Service's direct case. Requiring the Service to initiate a complex nationwide data collection and analysis at this time would undoubtedly delay a Commission recommendation. This effort might well fail to produce any useful data, and ANM has failed to justify the burden it would impose on the Postal Service. Given these considerations, I will not require the Postal Service to respond to ANM/USPS-20, 21, 25 and 26.

However, it is reasonable for the Service to answer ANM interrogatories ANM/USPS-22 and 23, which ask for: (1) Postal Service documents concerning the accounting treatment of mail marked as Standard A nonprofit, but either entered at Standard A commercial rates or later assessed additional postage due to nonprofit



eligibility; and (2) the instructions given to IOCS tally takers regarding classification of mail marked as Standard A nonprofit, but actually entered at another rate. Provision of this information, to the degree it exists, should not prove unduly burdensome to the Service. The Postal Service may limit its scope of inquiry and response to ANM/USPS-22 to those personnel at Service headquarters involved on a regular basis with RPW data, and to those handbooks applicable nationally. The Service's response to ANM/USPS-23 similarly may be restricted to instructions given on a national, system-wide basis, with information provided by headquarters personnel regularly involved with IOCS data systems.

In light of the rulings discussed herein, and until the scope of testimony likely to result from the Service's response to ANM/USPS-22 and 23 may be more fully described by ANM, I shall defer ruling on ANM's request for authority to file supplemental testimony.

#### RULING

The Motion of the Alliance of Nonprofit Mailers to Compel Answers for Interrogatories and for Permission to File Supplemental Testimony within Two Weeks of Receipt of Answers from the USPS (ANM/USPS-20-23 and 25-26), filed December 22, 1997, is granted in part, as specified above and subject to the conditions prescribed in the body of this ruling.



Edward J. Gleiman  
Presiding Officer